Office-Supreme Court, U.S.
FILED
MAY 18 1981
ALEXANDER L. S... ...
CLERK

No. 80-1695

# In the Supreme Court of the United States

**October Term, 1980**

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
*Petitioner,*

vs.

J. E. PELAEZ DEL CASAL, and
EASTERN AIR LINES, INC.
*Respondents.*

## RESPONDENT J. E. PELAEZ DEL CASAL'S BRIEF IN OPPOSITION

GARY D. FOX, ESQ.
(Counsel of Record)
FLOYD PEARSON STEWART RICHMAN
GREER & WEIL, P.A.
One Biscayne Tower
Twenty-fifth Floor
Miami, Florida 33131
Telephone: (305) 377-0241
*Attorneys for Respondent*

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

## QUESTION PRESENTED

Whether this Honorable Court should exercise its discretion and review a decision of the Court of Appeals which merely applied the well-settled rule of law that a union, in the treatment of employees within its bargaining unit, may not discriminate against those employees based on their status as non-members of the union.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... I
TABLE OF AUTHORITIES ..... III
STATEMENT OF THE CASE ..... 1
REASONS FOR DENYING THE WRIT ..... 6
CONCLUSION ..... 11
CERTIFICATE OF SERVICE ..... 12

## TABLE OF AUTHORITIES

### CITES

*Del Casal v. Eastern Air Lines, Inc.*, 634 F.2d 295 (5th Cir. 1981) ..... 6, 8, 9, 10
*Hughes Tool Co. v. NLRB*, 147 F.2d 69 (5th Cir. 1945) 8
*Thompson v. Brotherhood of Sleeping Car Porters*, 316 F.2d 191 (4th Cir. 1963) ..... 8
*Turner v. Air Transport Dispatchers Ass'n*, 468 F.2d 297 (5th Cir. 1972) ..... 8
*Vaca v. Sipes*, 386 U.S. 177 (1967) ..... 10, 11

### RULES

Rule 17, Rules of the Supreme Court ..... 6, 7, 11

# No. 80-1695

# In the Supreme Court of the United States

**October Term, 1980**

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
*Petitioner,*

vs.

J. E. PELAEZ DEL CASAL, and
EASTERN AIR LINES, INC.
*Respondents.*

## RESPONDENT J. E. PELAEZ DEL CASAL'S BRIEF IN OPPOSITION

### STATEMENT OF THE CASE

Petitioner AIR LINE PILOTS ASSOCIATION'S (ALPA) Statement of the Case is misleading, omits the most material facts and, in places, is simply inaccurate. The Respondent J. E. DEL CASAL [hereinafter referred to as the Plaintiff], is compelled, therefore, to offer the Court the following statement of the case.

In May, 1975, the Plaintiff, an airline pilot employed by EASTERN AIR LINES, was discharged by EASTERN.

Shortly thereafter, the Plaintiff approached an ALPA staff attorney in Miami, Florida, John Loomos, for the purpose of obtaining ALPA representation to contest his termination. (R. 82, p. 12). Mr. Loomos, within a short period of time, took the necessary steps to insure that a grievance was timely filed on behalf of the Plaintiff, pursuant to the terms of the collective bargaining agreement (hereinafter referred to as the "contract") between EASTERN and ALPA. (R. 82, pp. 13-14). The grievance was summarily rejected at the initial stages, as are the vast majority of grievances (R. 82, p. 16), and preparation was begun for a hearing before the Eastern Air Lines System Board of Adjustment (hereinafter "System Board"). The System Board is an arbitration tribunal established pursuant to the Railway Labor Act and the collective bargaining agreement entered into between EASTERN and ALPA. (R. 666-674).

Mr. Loomos, an ALPA staff attorney with some 15 years' experience, was the person who initiated the grievance mechanism on behalf of the Plaintiff (R. 82, p. 17) and, at that time, intended to represent him in his hearing before the System Board. (R. 82, p. 35). After doing some preliminary investigation into the background of Plaintiff's termination and speaking with several pilots about Plaintiff, Mr. Loomos determined that Plaintiff had a *meritorious grievance*. (R. 82, p. 32).

Mr. Loomos further testified that in the course of his entire investigation into the merits of Plaintiff's grievance, no one from EASTERN or ALPA or any other organzation told him that Plaintiff did not have a meritorious grievance. (R. 82, p. 55).

In order for Plaintiff's termination to be upheld, "just cause" must have existed for his termination (R. 82, p.

24); that is, there must have existed "some really compelling reason" (R. 82, p. 24) for firing him.

Prior to the System Board proceedings, Mr. Loomos testified that "the only criticism that I heard about [Plaintiff] was that they [certain EASTERN pilots] did not like him, that he had some personality problems." (R. 82, p. 76). Personality differences, however, were not grounds for termination under the "just cause" rule. (R. 82, pp. 55-56).

Shortly before the first scheduled System Board hearing, Mr. Loomos was ordered by his superiors at ALPA not to represent the Plaintiff because he, the Plaintiff, was not an ALPA member. (R. 82, p. 36). Mr. Loomos then wrote a letter to the Plaintiff advising him that "I was recently advised by the association that I could not represent you at the hearing to be held by the System Board of Adjustment *because you are not a member* [of ALPA]". (R. 959, emphasis added).

During discovery, the Defendant ALPA admitted, in its own answers to Plaintiff's interrogatories, that the reason it refused to represent him in the System Board hearings was that Plaintiff was not a member of ALPA. A gentleman named Seth Rosen, an ALPA lawyer in charge of all other ALPA staff lawyers, testified in deposition that ALPA has a general policy "not to represent nonunion members of the bargaining unit. This is a general policy." (*Rosen* at 34, L. 10). He further stated that even if ALPA became aware that an employer had falsified performance reports for the purpose of securing the discharge of a non-member, ALPA would do nothing to help or represent the non-member aside from explaining the grievance procedure and providing two members of ALPA to sit on the System Board. (*Rosen* at 55-56). In fact, Mr. Rosen testified that,

in the case of the termination of a non-member, ALPA does not even have a duty to investigate the validity of charges. (*Rosen* at 57-58).

ALPA's legal department also adheres to the policy discussed above. In a letter from ALPA's legal director to Mr. Otto Schick, a local ALPA official, who had requested advice as to whether ALPA should represent Plaintiff, the director states as follows:

> However, non-members are not entitled to utilize the services of ALPA staff attorneys in the course of grievance proceedings. ALPA policy contemplates that such attorneys' services be made available only to those who contribute their share of the financial costs involved. (Exhibit 28).

Mr. Schick, the chairman of ALPA's local Eastern Air Lines chapter, testified that he had unilaterally decided that the pilots of Eastern Air Lines had spent too much money defending non-ALPA pilots and, at the next opportunity, would determine what "minimal entitlement" a non-member should receive. (*Schick* at 32). The next opportunity happened to be Plaintiff's termination.

After being advised that ALPA would not represent him, Plaintiff, upon the recommendation of Mr. Loomos, retained private counsel to represent him. (R. 679). The attorney who represented Plaintiff before the System Board was David Block, who, in contrast to Mr. Loomos' fifteen years of experience, was a young lawyer approximately one year out of law school with no prior System Board experience. (R. 213, pp. 3, 18). Mr. Block, in his representation of Plaintiff, was at a distinct disadvantage in comparison to Mr. Loomos because of his (Mr. Block's) lack of practical aviation knowledge and unfamiliarity with the terms of the collective bargaining agreement. (R. 82, pp. 57-58, 71-72).

Following a series of bizarre hearings before the System Board of Adjustment,[1] Plaintiff's termination was predictably upheld.[2]

Plaintiff would call to the Court's attention the Petitioner's representation in its brief that ". . . [t]he record shows that not only did Loomos aid Del Casal at the initial stages of his grievance, but also that he attempted to appear at the System Board hearings in order to assist, but was excluded by Block . . . ." Petitioner's brief at 3, n. 4. That representation is patently false. Mr. Loomos himself said that, after the first hearing, he attended none of the other hearings *because he was instructed not to by the head of the local ALPA Office, Otto Schick.* Loomos deposition at 44.

---

1. The initial System Board panel, composed of four members, reached a 2-2 deadlock. Pursuant to the provisions of the collective bargaining agreement a fifth "neutral" member was thereafter appointed to break the deadlock and the procedural issue of whether Plaintiff should be reinstated came on for hearing before the "5-man" Board. The Defendant EASTERN presented its side of the case, following which the Board went into "executive session" and shortly thereafter "undeadlocked" and determined that the procedural manner in which Plaintiff had been terminated was proper and that the 4-man board should proceed to hear the merits of the case. (R. 829). Prior to the Board "undeadlocking," Plaintiff was given no opportunity whatsoever to present evidence or call witnesses to address the issue which the 5-man Board had been empaneled to hear, to wit: whether the way in which Plaintiff was terminated was so flawed as to require reinstatement. (R. 829).

2. The decision was predictable because the issue of Plaintiff's termination was tried before four people, two of whom represented the employer (EASTERN) which fired Plaintiff in the first instance, and two of whom represented the union which, prior to hearing the first word of testimony, had agreed with EASTERN that Plaintiff had been properly terminated. (R. 601). It is undisputed that no one disclosed to Plaintiff or anyone else the fact that both *ALPA* and Eastern had pre-determined the issue to be tried. Predictably, the System Board ultimately upheld Plaintiff's termination. (R. 685). The opinion of the System Board specifically stated that the decision in Plaintiff's case should not be considered "precedent" for other System Board cases. (R. 685).

Plaintiff then instituted the present action against EASTERN for wrongful discharge and ALPA for breach of the duty of fair representation. After discovery, the trial court, on March 1, 1979, entered a memorandum opinion and order in which it found that ALPA had breached its duty of fair representation because it had discriminated against the Plaintiff on the grounds of non-membership. In the same order, the court granted EASTERN's motion for summary judgment against the Plaintiff, finding that although ALPA had breached its duty of fair representation by not representing the Plaintiff before the System Board, the court did not have jurisdiction over EASTERN because the breach of the duty did not "substantially undermine" the integrity of the System Board. In other words, the district court held that the decision of the System Board was final and binding on the Plaintiff and precluded this action by him. (R. 957-965).

On July 12 and 13, 1979, the case proceeded to a jury trial against the Defendant ALPA on the issue of damages. The jury returned a verdict in Plaintiff's favor of $35,000.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the trial court's rulings in all respects. *Del Casal v. Eastern Air Lines, Inc.*, 634 F.2d 295 (5th Cir. 1981). Thereafter, ALPA filed the present petition for writ of certiorari.

## REASONS FOR DENYING THE WRIT

Rule 17 of the Rules of the Supreme Court provides that this Honorable Court will review decisions of Courts of Appeal by writ of certiorari ". . . only when there are special and important reasons therefor." Included within this category are decisions which conflict with those of other circuits and those which have ". . . so far departed

from the accepted and usual course of judicial proceedings, or so far sanctioned a deparature by the lower court . . ." as to necessitate the exercise of this Court's supervisory power. Respondents respectfully submit that the present case fits within none of the categories of Rule 17, but merely represents an application of well-settled principles of law to the particular facts of this case.

When one cuts through all of the confusing verbiage of the Petition, it becomes clear that Petitioner's only argument is that the decision below:

> . . . establishes a *per se* rule that unions which furnish counsel to dues-paying members and to agency fee payors must provide the same service to non-members who pay no part of the cost of the service.

(Petitioner's brief at 5.)

The "per se" rule to which ALPA frequently refers in the course of its brief,[3] was created by, and exists only in the imagination of ALPA. There is certainly no language in the Fifth Circuit's opinion which even suggests, much less establishes anything even remotely resembling a "per se" rule.

What ALPA has done is to manufacture an imaginary holding on the part of the Fifth Circuit, the purpose of which is to grab the Court's attention. Plaintiff readily acknowledges that if, as Petitioner contends, the Court of Appeals had mandated a "per se" rule requiring unions to provide non-members with attorneys in grievance proceedings, such a ruling would indeed be a novel one. Even the most superficial reading of the decision below, however, reveals that the Fifth Circuit *specifically refrained* from making the ruling which Petitioner alleges was part of the court's holding.

---

3. See pages 5, 7, 9, 10 and 12 of Petitioner's brief.

The Fifth Circuit held that because ALPA's decision not to represent the Plaintiff was based solely on his status as a non-union member, ALPA had violated the cardinal rule that a union, in its treatment of employees within its bargaining unit, may no more discriminate on the basis of non-membership than on the basis of race, religion or national origin. 634 F.2d at 301. The proscription against discrimination on the basis of non-membership is well-settled. *Turner v. Air Transport Dispatchers Ass'n,* 468 F.2d 297, 301 (5th Cir. 1972); *Thompson v. Brotherhood of Sleeping Car Porters,* 316 F.2d 191 (4th Cir. 1963); *Hughes Tool Co. v. NLRB,* 147 F.2d 69, 74 (5th Cir. 1945).

ALPA acknowledges that the sole reason it refused to allow its attorney, John Loomos, to represent the Plaintiff was because the Plaintiff was not an ALPA member. Parenthetically, Plaintiff would point out to the Court that ALPA's decision was particularly unjust in light of the fact that Mr. Loomos, who investigated the facts and circumstances surrounding Plaintiff's termination, determined that Plaintiff had a meritorious grievance. (R. 82, p. 32).

Thus, all that the Fifth Circuit did in the present case was to find that, in light of ALPA's own admissions that Plaintiff had a meritorious grievance and that it refused to represent him simply because he was not a member of the union, ALPA had violated its duty of fair representation. The Court of Appeals most assuredly did not establish a ". . . *per se* rule that unions which provide counsel to grievants in arbitration proceedings must provide this expensive service without regard to whether the particular grievant shares in the cost . . .". Petitioner's brief at 12. It is of particular interest that Petitioner is unable to cite to this Court *any language whatsoever* from the opinion of the Fifth Circuit which supports its position.

Petitioner advises the Court that the decision below will somehow require unions to extend to non-members all

benefits incident to union membership and that it will further require unions to provide attorneys to grievants even if the union considers the grievance to be lacking in merit. For ALPA to advance such a contention is remarkable. The Fifth Circuit, far from rejecting ALPA's position on these issues, unequivocally recognized these doctrines:

> The court accepts ALPA's arguments that the duty of fair representation does not require a union to accept a particular individual into membership, that a union is not obligated to extend those internal benefits enjoyed by its members to nonmembers, and that a union may refuse to prosecute a grievance which it considers to be lacking in merit; however, these arguments are not dispositive of the issue in this case. (634 F.2d at 300).

The opinion below then proceeds to discuss the real issue in the case, to wit: whether ALPA could discriminate against members of the bargaining unit which it represents on the basis of non-membership in the union. The court properly held, under the authorities cited *supra*, that to do so constituted a violation of ALPA's duty of fair representation.

The court below also recognized and affirmed the proposition of law which ALPA states it abolished, to wit: the union has the authority to decide, if it does so in a nondiscriminatory manner, when it may supply an attorney to represent a grievant:

> While ALPA *has the authority to decide under what conditions an attorney will be supplied to a grievant,* that fact that the grievant is not a member of the union can play no part in that decision. (634 F.2d at 301, emphasis supplied).

Petitioner contends that the decision below conflicts with and/or extends in some manner this Honorable

Court's holding in *Vaca v. Sipes,* 386 U.S. 177 (1967). In that case the Court defined the basic duty of fair representation in the following terms:

> Under this doctrine, the exclusive agent's statutory authority to represent *all members* of a designated unit includes a statutory obligation to *serve the interest of all members without hostility or discrimination toward any,* to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. (386 U.S. at 177, emphasis supplied).

Far from conflicting with *Vaca v. Sipes, supra,* the Fifth Circuit expressly recognized the principles of law set forth above and applied them to the facts of this case. 634 F.2d at 301. The finding of the court below that ALPA had violated its duty of fair representation by not representing Plaintiff because he was not a member is a direct application of the doctrine of *Vaca v. Sipes, supra,* which requires non-discriminatory treatment of all members of the bargaining unit, regardless of the employee's union affiliation.

Finally, Petitioner's last gasp is to advance a convoluted argument to the effect that it should not be liable for damages sustained by the Plaintiff because he ". . . has suffered no violation of his employment rights . . .". Petitioner's brief at 13. The argument is pure sophistry. In *Vaca v. Sipes, supra,* this Court succinctly set forth the law on damages in cases, such as the present one, in which both an employer and union have been sued:

> The governing principle, then, is to apportion liability between the employer and the union *according to the damage caused by the fault of each.* (386 U.S. at 197).

Here, as a direct result of the union breach of its duty to represent him, Plaintiff had to hire a private attorney for the System Board hearings. As a result of having to hire a private attorney, Plaintiff incurred substantial

legal fees. Plaintiff's indebtedness for the attorney's fees, therefore, was a direct and proximate result of the breach by the union. Pursuant to the above-quoted portion of *Vaca v. Sipes, supra,* ALPA was only held liable for the damage caused by its wrongful conduct.

What Petitioner has done in this case is to take an innocuous opinion by the Fifth Circuit and, through legal gymnastics and simple sophistry, attempt to persuade this Honorable Court that the court below created some abominable new rule of law that will wreak havoc with the Railway Labor Act and Labor Management Relations Act and, in general, turn the body of labor law on its head. Nothing could be further from the truth.

The Fifth Circuit merely affirmed the rule that a union cannot discriminate against employees within its bargaining unit based upon that person's status as a non-member of the union. In so doing the court applied the well-settled dictates of *Vaca v. Sipes, supra,* and its progeny.

Respondent respectfully submits that this case does not even approach the circumstances set forth in Rule 17 for the discretionary exercise of this Court's jurisdiction.

## CONCLUSION

The Petition borders on the frivolous. For reasons set forth above, it should be denied.

Respectfully submitted,

FLOYD PEARSON STEWART RICHMAN
GREER & WEIL, P.A.
One Biscayne Tower
Twenty-fifth Floor
Miami, Florida 33131
Telephone: (305) 377-0241
By GARY D. FOX

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing were mailed this 4th day of May, 1981 to: Gary Green, Esquire, Air Line Pilots Association, Int'l, 1625 Massachusetts Avenue, N.W., Washington, D.C. 20036; Carmen Leon & William Bell, Esqs., Eastern Air Lines, Inc., Miami International Airport, Miami, Florida 33148; and Daniel B. Edelman, Yablonski, Both & Edelman, 1140 Connecticut Ave., N.W., Washington, D.C. 20036.

Printed briefs of this Respondent's Brief in Opposition were mailed this 21st day of May, 1981.

By GARY D. FOX